Supreme Court, U.S.
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No. 87-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELISA CHAN, *et al.*,

Petitioners,

v.

KOREAN AIR LINES, LTD.,

Respondent.

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Question Presented for Review

In actions governed by the Warsaw Convention, a treaty of the United States, does the treaty sanction of unlimited liability without fault, set forth in Article 3(2) of the Warsaw Convention, which by its own terms applies only "if a passenger is accepted without a passenger ticket having been delivered", also apply where the delivered passenger ticket contains an Advice as to the applicability of the Warsaw Convention to the transportation which is printed in 8 point rather than 10 point type size as specified in the intercarrier Montreal Agreement?

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Respondent Korean Air Lines, Ltd.[1] (hereinafter KAL) has no reasonable basis for opposing certiorari because the decision of the Court below has created a clear conflict among the Circuit Courts of Appeals as to the proper interpretation and meaning of the Warsaw Convention,[2] a treaty of the United States.

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[1] Correct name, Korean Air Lines Co., Ltd., a subsidiary of which is Korean Air Terminal Service Co., Ltd.

[2] Official Title: Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976).

1. Certiorari Should Be Granted to Resolve the Conflict in Decisions of the Circuit Courts of Appeals Created by the Decision Below and the Decision Below Should Be Affirmed

The decision of the Court of Appeals has created a live and direct conflict with prior decisions of the Court of Appeals for the Second Circuit[3] as to the proper interpretation of the Warsaw Convention.

The Court of Appeals below adopted as its own opinion on this issue the comprehensive Memorandum Decision of the District Court for the District of Columbia interpreting the Warsaw Convention and Montreal Agreement.[4] The District Court did not follow by rote the decisions of the Court of Appeals for the Second Circuit but rather conducted an independent and exhaustive analysis of the history of the Warsaw Convention, the language of the Treaty and the Montreal Agreement and the correlation between the Montreal Agreement and the Warsaw Convention. The District Court also gave deference to a decision of the Supreme Court of another Party to the Treaty, Canada, interpreting the same provision of the Warsaw Convention.[5] The District Court concluded that the decisions of the Court of Appeals for the Second Circuit were incor-

[3] *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983); *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided Court*, 390 U.S. 455 (1968).

[4] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), *reprinted in* Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 515-16 (1974).

[5] *Ludecke* v. *Canadian Pacific Airlines*, 98 D.L.R.3d 52 (Can. 1979); *In re Korean Air Lines Disaster of September 1, 1983*, 664 F.Supp. 1463, 1474 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C.Cir. 1987).

rect interpretations of the Warsaw Convention and declined to follow them. The Court of Appeals affirmed this decision of the District Court thereby creating a direct conflict among the Circuits on this issue.

Recognizing this, the Court of Appeals stated that:

> the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretative authority in a case such as this one, are matters in need of definitive resolution for our national court system.[6]

The Court of Appeals also agreed with the observation of the District Court that

> [i]f . . . more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The uniformity achieved in this [way] is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.[7]

In not opposing certiorari, KAL emphasizes, respectfully, that the decision of the Court of Appeals is correct in all respects and should be affirmed by the Court.

2. This Is the Appropriate Case in Which to Grant Certiorari Because the Decision Below Has Created the Conflict in Decisions of the Circuit Courts of Appeals

A Petition for a Writ of Certiorari filed on November 6, 1987 in *Pan American World Airways, Inc.* v. *Lopez*, No. 87-750, presents as a secondary question for review the

[6] 829 F.2d 1171, 1176.

[7] *Id.*

same question presented by the Petition herein. The *Lopez* case is not the appropriate case in which to review this question.

The Court of Appeals for the Fifth Circuit in the *Lopez* case merely followed by rote and without any independent analysis and judgment prior precedents of the Court of Appeals for the Second Circuit.[8] Neither the lower court decision nor the decision of the Court of Appeals for the Fifth Circuit in the *Lopez* case provides a dispositive opinion or rationale of benefit to the Court in resolving the conflict created by the decision of the Court of Appeals below.

The Warsaw Convention issue was not raised by Pan American in the *Lopez* case in seeking rehearing in the Court of Appeals for the Fifth Circuit, even though the District Court in the case at bar earlier had rendered its decision on this issue.[9] The impetus for Pan American to include this question in the Petition in the *Lopez* case was the decision of the Court of Appeals below. *See* Application of Pan American World Airways for an Extension of Time in which to file a Petition for a Writ of Certiorari, p. 3, filed October 8, 1987 in the *Lopez* case, in which Pan American stated:

> [T]he recent decision in *Korean Air Lines Disaster, supra,* has created a conflict among the Circuits over

[8] *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 789 F.2d 1092, 1098 (5th Cir. 1986), *reinstated on rehearing en banc*, 821 F.2d 1147, 1169 & 1171 (5th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3401 (Nov. 6, 1987).

[9] The Memorandum Decision of the District Court for the District of Columbia was filed July 25, 1985. 664 F.Supp. 1463. The opinion of the panel of the Court of Appeals for the Fifth Circuit in the *Lopez* case was filed May 7, 1986. 789 F.2d 1092. Rehearing *en banc* was granted in *Lopez* on July 8, 1986. 795 F.2d 381.

> the interpretation of the Warsaw Convention, warranting Pan Am in seeking certiorari on that issue as well as on the *forum non conveniens* issue . . . .

The *Lopez* Petition presents principally a *forum non conveniens* question for review by the Court with the Warsaw Convention issue as an added subsidiary issue.

The decision on the Warsaw Convention issue more appropriate for review by the Court is the decision of the Court of Appeals below which actually brought the Circuits into conflict, especially where, as here, the issue was fully briefed, argued, considered and decided by the District Court and the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted and the decision of the Court of Appeals affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 12th day of January, 1988 served the foregoing Memorandum of Respondent upon Petitioners by depositing three (3) copies of same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Milton G. Sincoff, Counsel of Record for Petitioners, Kreindler & Kreindler, 100 Park Avenue, New York, New York 10017 and Donald W. Madole, Speiser, Krause & Madole, 1216 16th Street, N.W., Washington, D.C. 20036.

January 12, 1988

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